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No. 93-1629

In the Supreme Court of the United States

OCTOBER TERM, 1993

JAMES N. STEPHENS, ETC., PETITIONER

v.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the doctrine of res judicata applies in suits brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*

2. Whether, assuming that res judicata applies to Title VII cases, petitioner's prior suit involved "the same nucleus of operative facts" as his present action.

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OPINIONS BELOW

The per curiam decision of the court of appeals (Pet. App. 1a) is unpublished but is noted at 9 F.3d 121 (Table). The opinion of the district court (Pet. App. 1b-9b) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1993. A petition for rehearing was

denied on January 7, 1994. Pet. App. 1f.[1] The petition for a writ of certiorari was filed on April 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985 petitioner, then a deputy regional attorney and acting regional attorney at the Department of Health and Human Services (HHS), applied for a permanent position as regional attorney. When petitioner was not selected for the position, he filed two grievances with HHS's Office of General Counsel (OGC), objecting to certain procedures used in the selection process.[2] While his grievances were pending, petitioner also filed an Equal Employment Opportunity (EEO) complaint, alleging discrimination on the basis of age. Pet. App. 2b.

Because petitioner was a supervisory employee, his grievances were processed under Office of Personnel Management (OPM) and HHS regulations covering nonbargaining unit workers. Pet. App. 3d, 9d. Pursuant to the then-applicable OPM regulation defining "Grievance coverage" (5 C.F.R. 771.205 (1992)), petitioner was entitled to grieve "any matter of concern or dissatisfaction relating to the employment of

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[1] Petitioner filed a Suggestion of Rehearing En Banc, which under the Eleventh Circuit's rules is considered to be a petition for rehearing as well. See 11th Cir. R. 35-6; see also *Missouri* v. *Jenkins*, 495 U.S. 33, 50 (1990).

[2] Petitioner also filed additional grievances challenging other personnel actions: (1) His non-appointment to "the new position of Chief Counsel-SES"; (2) the elimination of his position as Deputy Chief Counsel; and (3) his non-appointment to "two newly created positions of Deputy Chief Counsels." Pet. 6.

an employee which is subject to the control of agency management, including any matter on which an employee alleges that coercion, reprisal, or retaliation has been practiced against him or her," except those set forth in 5 C.F.R. 771.206(c) (1992). Among the matters excepted from grievance under that regulation were (1) the non-selection for promotion from a group of properly ranked and certified candidates or failure to receive a noncompetitive promotion, 5 C.F.R. 771.206(c)(iii) (1992), and (2) any decision which is appealable to the Merit Systems Protection Board or subject to final administrative review by the Office of Personnel Management or the Equal Employment Opportunity Commission (EEOC). 5 C.F.R. 771.206(c)(ii) (1992).[3]

Petitioner's grievance was denied on the ground that non-selection for promotion is not covered by the grievance process. Petitioner subsequently requested formal grievance processing, including an investigation and hearing. When HHS denied the formal proc-

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[3] The current version of the regulation excludes "[a] matter * * * in which the employee is entitled to file an appeal or other formal challenge for which the following organizations have authority to grant a remedy: * * * the Equal Employment Opportunity Commission." 5 C.F.R. 771.105(b)(2) (1993).

HHS's Personnel Instruction Manual notes that 5 C.F.R. 771.206(c)(ii) (1992) excludes complaints of discrimination from grievance coverage. The Manual accordingly provides that "a grievance concerning a matter or matters about which the employee has filed a formal complaint of discrimination must be rejected, either wholly or partially as appropriate." Pet. 3. In an explanatory parenthetical, the Manual states that where a grievance covers "more than one matter * * *, only those matters for which discrimination has been alleged must be rejected." *Ibid.*

essing, he requested reconsideration. This was denied on the ground, *inter alia*, that petitioner had filed an EEO complaint on the same matter.[4] Pet. App. 2b, 5d; Pet. 6-7.

Petitioner also filed two suits in federal district court—one against HHS, and one against Terry Coleman and Isabel Dunst, two officials in the OGC who had served on the selection board for the regional attorney position.[5] Pet. App. 2b. Petitioner's complaints in these cases alleged, *inter alia*, "that reconsideration of the grievance was denied because of his having filed a discrimination complaint, in violation of 5 C.F.R. § 771.302(c)(1) assuring freedom from reprisal." Pet. App. 3b.

The suit against HHS was dismissed under Fed. R. Civ. P. 12(b)(6) on the ground that the Civil Service Reform Act (CSRA) provided the exclusive remedy for contesting petitioner's non-selection for the position of regional attorney. Pet. App. 3b. The suit against Coleman and Dunst was dismissed as well. *Id.* at 2b-3b. The Eleventh Circuit affirmed. *Stephens* v. *Department of Health & Human Services*, 901 F.2d 1571, cert. denied, 498 U.S. 998 (1990).

Petitioner subsequently challenged HHS's policy of rejecting all grievances arising from personnel actions that are the subject of discrimination complaints. He filed an EEO class complaint (Pet. App. 3b), al-

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[4] Petitioner then filed individual EEO complaints, claiming unlawful retaliation for his having filed the EEO discrimination complaint. Pet. App. 2b.

[5] The complaint against the individual defendants sought essentially the same relief as that against HHS, to the extent that relief was unavailable against the agency. *Stephens* v. *Department of Health & Human Services*, 901 F.2d at 1574.

leging that "he and others have been subjected to retaliation for filing EEO complaints." *Id.* at 7e. That complaint was rejected because it (1) was not within the purview of 29 C.F.R. 1613.601 *et seq.* ("Class Complaints of Discrimination"),[6] (2) was untimely filed, and (3) failed to show the existence of a sufficiently numerous class. Pet. App. 16e.

2. Petitioner then filed the present class action in federal district court, claiming that the HHS policy of not accepting a grievance when the grievant has already filed a discrimination complaint amounts to retaliation forbidden by the Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*[7] Pet. App. 1g-6g. The district court held that petitioner's suit was barred by res judicata and granted HHS's motion for summary judgment. *Id.* at 8b-9b. Noting that the doctrine of res judicata "precludes the parties or their privies from relitigating issues that were or could have been raised" in the prior action, *id.* at 6b (quoting *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980)), the district court set forth the "four elements" that "must be present" for the doctrine to apply: "(1) a final judgment on the merits rendered in the previous suit; (2) the judgment was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both cases; and (4) the same cause of action is involved in both cases." Pet. App. 6b-7b.

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[6] The EEOC Administrative Judge concluded that the Commission's regulations did not permit the filing of a class action alleging retaliation. Pet. App. 12e-13e.

[7] The complaint further alleged that the policy violates 5 C.F.R. 771.201 *et seq.* and HHS's "own regulation HHS 771-3" (Pet. App. 5g), and thereby denies petitioner and other class members "administrative due process." *Ibid.*

The court explained that a dismissal under Fed. R. Civ. P. 12(b)(6) constitutes a "[final] judgment on the merits." Pet. App. 7b. The court also noted that "[i]f [the original] claim is litigated by a[n] individual, filing a subsequent suit as a class action will not prevent the application of res judicata." *Ibid.* Finally, the court emphasized that "if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, the two cases are really the same claim or cause of action for purposes of res judicata." *Id.* at 7b-8b (internal quotation marks, emphasis, and ellipsis omitted).

The court held that petitioner's "prior suit[s] against HHS and against Coleman and Dunst meet all four criteria." Pet. App. 8b. Both suits were dismissed under Rule 12(b)(6) "and thus were adjudicated on the merits"; as the Eleventh Circuit had noted, jurisdiction in the earlier actions had been proper "based on 28 U.S.C. § 1331"; and the parties in the present suit were identical to those in the prior litigation. Pet. App. 8b. Finally, the court observed that "both the [present] case and the prior suits arose from [petitioner's] allegations that his grievance was wrongfully denied because of his having also filed a discrimination complaint." *Ibid.* The district court therefore granted the government's motion for summary judgment. *Id.* at 9b. The court of appeals affirmed in an unpublished per curiam order. *Id.* at 1a.

ARGUMENT

1. Petitioner contends that the application of res judicata to a Title VII case is inconsistent with this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974). However, *Alexander* did not address the res judicata effect of a prior *district court* judgment. Rather, that case considered only "the proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements in the resolution and enforcement of an individual's rights to equal employment opportunities under Title VII." 415 U.S. at 38. The Court held that the prior arbitral decision denying a dismissed employee's claim of racial discrimination under the nondiscrimination clause of a collective-bargaining agreement did not foreclose his right to trial de novo under Title VII. *Id.* at 59-60. The Court recognized "[t]he distinctly separate nature of [the employee's] contractual and statutory rights," *id.* at 50; it emphasized as well "the union's exclusive control over the manner and extent to which an individual grievance is presented," *id.* at 58 n.19, noting that "[i]n arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Ibid.*[8] These concerns

[8] This Court has recently explained that "because the arbitration in [*Alexander* and two related cases] occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1657 (1991). See also *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 75 (1975) (the

have no application in the present setting: petitioner had access to a judicial forum in his prior lawsuits, and he was in full control of the earlier litigation.

The decision more closely on point is *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982). In *Kremer* the Court held that a prior state court judgment was entitled to preclusive effect, pursuant to 28 U.S.C. 1738, in plaintiff's Title VII suit. 456 U.S. at 466-478. The Court observed that "[i]n our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum." *Id.* at 485. The Court found nothing in the text or legislative history of Title VII suggesting an exception to this rule of adjudication, *id.* at 470; to the contrary, the Court noted, one exchange on the Senate floor reflected the assumption that res judicata would apply in Title VII suits. *Id.* at 475-476. The Court distinguished *Alexander*,

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Court "held in *Alexander* * * * that a union may not circumscribe an employee's opportunity to seek relief under Title VII"). Cf. *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 332-333 (1980) (individual employee's Title VII suit is not precluded when EEOC obtains classwide relief in its own enforcement action).

Petitioner relies upon this Court's statement that "[t]he policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel." Pet. 16 (quoting *Alexander*, 415 U.S. at 49 n.10). Read in context, however, that statement means simply that a prior arbitral decision cannot preclude an employee's Title VII suit regardless of whether the basis for preclusion is characterized as election of remedies, waiver, res judicata, or collateral estoppel. See 415 U.S. at 49 n.10 ("Whatever doctrinal label is used, the essence of these holdings remains the same.").

noting that the holding in that case "was that a private arbitration decision concerning an employment discrimination claim did not bind the federal courts." *Id.* at 477. Although *Kremer* involved a prior state court judgment, there is no reason for denying the judgment of a federal district court similar preclusive effect.

The two courts of appeals to address the issue have held that federal court judgments are entitled to res judicata effect in subsequent Title VII actions. In *Herrmann* v. *Cencom Cable Associates*, 999 F.2d 223, 225 (7th Cir. 1993), the Seventh Circuit concluded that "[p]arties to Title VII actions enjoy no immunity from res judicata." Similarly, in *Woods* v. *Dunlop Tire Corp.*, 972 F.2d 36, 39 (2d Cir. 1992), cert. denied, 113 S. Ct. 977 (1993), the Second Circuit held that "the language and policy of Title VII do not undercut the application of res judicata." Cf. *Gutzwiller* v. *Fenik*, 860 F.2d 1317, 1332-1333 (6th Cir. 1988) (where plaintiff sues under both 42 U.S.C. 1983 and Title VII, jury's finding of discriminatory intent in Section 1983 suit has preclusive effect, and trial court may not issue contrary finding in ruling on Title VII claim); *Garza* v. *City of Omaha*, 814 F.2d 553, 557 (8th Cir. 1987) (same).

The decision of the Sixth Circuit in *Lyght* v. *Ford Motor Co.*, 643 F.2d 435 (1981), is not to the contrary. Although the *Lyght* court stated in dictum that "the doctrines of *res judicata*, collateral estoppel and election of remedies normally do not apply in Title VII actions," 643 F.2d at 438, its holding was much more limited. The court held only that the settlement of a discrimination complaint filed with the Michigan Civil Rights Commission (MCRC) did not bar plaintiff's subsequent Title VII action. The

court emphasized that while "Title VII evinces a congressional preference for conciliation over litigation, the fact remains that a person who claims injury from discrimination in employment practices is entitled to a hearing in federal court." *Id.* at 441. The court further explained that "[t]hough the MCRC adjustment may fairly be treated as a knowing and voluntary partial settlement by Lyght * * *, it is insufficient to constitute a waiver of his right to seek a complete remedy in a federal court." *Ibid.* Those concerns have no relevance to the present case, where petitioner's challenge to the denial of his grievance was asserted in a prior federal lawsuit.

2. Petitioner also argues that, even if res judicata principles apply to Title VII suits, the district court's application of those principles in this case conflicts with the decision in *Herrmann* v. *Cencom Cable Associates, supra.* In *Herrmann* the Seventh Circuit stated that

> [in] the typical retaliation case, * * * an employee files a claim based on some set of facts and then the employer fires him for filing the claim, precipitating a second claim. They are two claims, not one, for puposes of res judicata. While it is true in such a case that, but for the filing of the first claim, there would not have been a second claim, the two claims are based on (largely) different facts: the first claim on whatever facts gave rise to that claim, the second claim on the filing of the first claim and the employer's response to that filing.

999 F.2d at 227 (citation omitted).

The district court's approach in the present case does not conflict with that analysis. The district court

did not hold that petitioner's suit was barred simply because his claim of retaliation would not have arisen "but for" his non-selection as regional attorney. Rather, the court determined that petitioner's claim of retaliation had actually been asserted in the prior litigation: the court explained that "both the [present] case and the prior suits arose from [petitioner's] allegations that his grievance was wrongfully denied because of his having also filed a discrimination complaint." Pet. App. 8b. Thus, the present suits "arose from the same nucleus of operative facts as the prior suits" and "involve[d] the same cause of action as the prior suits." *Ibid.* Accord *Herrmann*, 999 F.2d at 226 ("two claims are one for purposes of res judicata if they are based on the same, or nearly the same factual allegations"); *Woods*, 972 F.2d at 38-39 ("Essentially the same underlying occurrence was relevant to both the [prior] and Title VII claims.").[9]

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[9] Petitioner does not attempt to explain why the difference between his current claim (that he was the subject of a "secret uniform practice on grievance rejection," Pet. 21) and his original claim (that "his own grievances had been rejected for having filed EEO claims," *ibid.*) has any significance in the application of res judicata principles. In any event, there was nothing "secret" about the policy, since 5 C.F.R. 771.206(c)(ii) (1992) excluded from grievance coverage any decision that was appealable to the MSPB, OPM, or EEOC. Indeed, HHS's June 24, 1988, letter to petitioner, see Pet. App. 5d, specifically described the agency's policy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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